

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 81/2011

**BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA (AG)**

JEROME THOMPSON v R

Linton Gordon instructed by Frater Ennis & Gordon for the applicant

Mrs S Sahai Whittingham-Maxwell for the Crown

22 and 23 September 2015

ORAL JUDGMENT

BROOKS JA

[1] On 30 June 2011, the applicant, Mr Jerome Thompson, was convicted in the High Court Division of the Gun Court on an indictment containing two counts. The first, charged him with the offence of illegal possession of firearm and the second, with robbery with aggravation. He was sentenced, on 29 July 2011, to seven years imprisonment in respect of the first count and 15 years imprisonment in respect of the second.

[2] Mr Thompson's application for permission to appeal against the convictions and sentences were considered by a single judge of this court, who refused his application. Mr Thompson has sought to renew his application before the full court. Mr Linton Gordon, who appeared on his behalf in respect of the renewed application, quite properly informed the court that there was nothing of merit that he could advance in support of the application in respect of the conviction. We agree with Mr Gordon and thank him for his candour. He however, argued for a reduction of the sentence. Those submissions shall be dealt with below. The case for each side will first be examined.

The Crown's case

[3] In brief, the evidence led by the prosecution at the trial was that on 26 September 2010, sometime between 3:30 and 4:30 am, the virtual complainant Dr Musah Mohammed was robbed at gunpoint of his wallet containing either J\$100,000.00 or J\$120,000.00, US\$200.00, Bermudian \$2.00, Guyanese \$1.00, a T-Star cellular phone and a gold chain with a pendant. This was at his business place situated at 2 Cottage Complex, in Old Harbour in the parish of Saint Catherine.

[4] The indictment specified different figures for the Jamaican currency, namely, J\$13,600.00 and specified a Ghanaian dollar rather than a Guyanese dollar.

[5] Dr Mohammed, who was the first of the two witnesses for the Crown, told the court that whilst he was outside the premises, locking up, someone approached him from behind, said to him that "it was a robbery" and told him not to move or make any noise. He, however, thinking it was a prank, turned around to face the person. He saw

a male person who was of fair complexion and taller than him holding an object that looked like a gun. Dr Mohammed then described the object that the man was holding in his hand as long, cylindrical and silver looking, with a hole in the mouth. He also said that he could see the trigger and that the person's index finger was holding the trigger.

[6] Dr Mohammed also told the court that the person's face was partially covered with a handkerchief and the person kept saying that it was a robbery.

[7] A short struggle ensued between them and Dr Mohammed fell to the ground. His assailant took his wallet containing the cash mentioned above, as well as the other items. He said his assailant took the contents of his wallet and gave him back the wallet. The man then ran off, jumped over a wall and disappeared into the rainy night.

[8] Dr Mohammed said he went to the Old Harbour Police Station sometime between 4:00 and 4:20 am and there made a report to the police. He gave the police a description of the person and what he was wearing, including the colour of the handkerchief tied around his face. Constable Omar Cohen, the prosecution's second witness, received the report.

[9] Acting on the report made by Dr Mohammed, as well as further information that he had received, Constable Cohen, at about 6:30 that morning, went to Mr Thompson's house with a search warrant that authorized him to search for a firearm. When he went inside Mr Thompson's house, he saw him lying on a bed and saw wet clothing on the

floor. His attention was immediately drawn to the clothing on the floor, based on the information he had received from Dr Mohammed.

[10] He told Mr Thompson about the matter he was investigating and asked him about the wet clothes. Constable Cohen told the court that Mr Thompson told him that he had been planting seeds in the rain and that is how the clothing had gotten wet. Constable Cohen said he then asked Mr Thompson to show him where he had planted the seeds and at that point Mr Thompson said, “[o]fficer, mek mi tell yuh the truth, a shelter mi did a shelter from the rain when the man drive up and mi use one knife fi rob him, mi never use nuh gun” (page 37 of the transcript).

[11] Constable Cohen then asked Mr Thompson to show him the items that he had taken from the doctor. Mr Thompson pointed to a wardrobe in the room. Constable Cohen searched the wardrobe and there he found a silver and black T-Star cellular phone, one gold looking necklace with a pendant that had a cross on it, J\$1,750.00, US\$59.00 and a Bermudian \$2.00 note.

[12] Consequently, Constable Cohen took Mr Thompson into custody. Dr Mohammed later identified the cellular phone and the gold chain as belonging to him and as being some of the items that had been taken during the robbery. Some weeks later Constable Cohen charged Mr Thompson for the offences for which he was tried.

[13] Both witnesses for the Crown were subjected to extensive cross-examination. Dr Mohammed was challenged on the basis that he was mistaken when he said that the

person who robbed him had a gun. The doctor however insisted that he saw a trigger and the hole in the mouth of the cylindrical object and that he thought that it was a gun. He also testified that the area where the incident occurred was well lit.

[14] One of the foci of the cross-examination of Constable Cohen, was a suggestion to him that while the police were at Mr Thompson's house, Mr Thompson told him (Constable Cohen) that he didn't know anything about any robbery or any jewellery. This Constable Cohen denied.

[15] Another focus of the cross-examination was that the confession that Constable Cohen told the court was made by Mr Thompson, was not voluntarily made. It was suggested that the confession was as a result of Constable Cohen's colleagues beating Mr Thompson at the police station. This was while Constable Cohen looked on. Constable Cohen denied these suggestions.

[16] A third area stressed in the cross-examination was the length of time that elapsed between the date of arrest and the date that Mr Thompson was charged, given the fact that the items were said to have been found at the house the same morning. Constable Cohen's explanation for the delay was that he was hoping to get additional statements and to put Mr Thompson on an identification parade.

The case for the defence

[17] Mr Thompson gave an unsworn statement. He accepted that the items were found at his home, but said that he did not take them from Dr Mohammed. Mr

Thompson told the court that he got the items from a man, whom he described as a "cokehead". He said that the man told him that he had found them on a bus that he had washed. Mr Thompson said he took these items from this man and took them home.

[18] Mr Thompson said that he gave the items to the police while they were at his house. It was in response to the police saying to him that "the doctor man only want his phone and his chain. And then dem will let me out" (page 114 of the transcript). He said that they took him to the police station and beat him to get him to tell them about the whereabouts of a gun. It was in the course of that beating that he told them that "a noh gun wi use, a knife" (page 119 of the transcript).

The decision in the court below

[19] The learned trial judge in her summation correctly directed herself as to the issues of the burden and standard of proof. She also accurately considered the issues of alibi and circumstantial evidence and how such evidence should be treated.

[20] The learned trial judge also assessed the evidence of the respective witnesses. She accepted Dr Mohammed's evidence and pointed out that the inconsistency regarding the time when the incident occurred, 3:30 versus 4:30 am, was a minor inconsistency and did not affect his credibility.

[21] The learned trial judge also assessed the unsworn statement given by Mr Thompson. She rejected his explanation as to how he came to be in possession of the

items that were recovered at his house. She also rejected his version of the circumstances under which he made the admission to the police. After reviewing the evidence as a whole, the learned trial judge found Mr Thompson guilty on both counts in the indictment.

Analysis

[22] With respect to the conviction we agree with Mr Gordon that the learned trial judge properly identified the relevant law and applied it to the evidence. She could, however, have more fully addressed the issue of recent possession.

[23] Although she did identify one of the issues as being recent possession, the learned trial judge did not explain that the usual presumption applied in recent possession cases, does not apply in cases involving violence. The rationale being that the accused person may well only be a receiver of stolen property.

[24] In both **Ronique Raymond v R** [2012] JMCA Crim 6 and **Ashan Spencer v R** SCCA No 14/2007 (delivered 10 July 2009), it was held that recent possession of goods stolen during a robbery was insufficient to support weak identification evidence. It was established in **Calvin Powell and Lennox Swaby v R** [2013] JMCA Crim 28, however, that recent possession along with other evidence, when considered as a whole, may connect an accused person to more than just the receipt of stolen property.

[25] In the circumstances of this case it would not be wrong to consider the principle of recent possession. The description of the clothing and the handkerchief by Dr

Mohammed, the clothing being wet when found at Mr Thompson's home, the evidence of a confession by Mr Thompson, and the finding that Mr Thompson's explanation of his possession of the items was untrue, could properly be considered along with the recent possession of Dr Mohammed's property to conclude that Mr Thompson was the robber.

[26] The learned trial judge considered all these things in coming to her conclusion of his culpability. She considered them in the context of a case based on circumstantial evidence. She said, in part, at page 146 of the transcript:

"...I consider all of that and I decide what weight to put to the words which were allegedly spoken by the accused man in which he said he did the act but with a knife. I have regard to that statement that he has made because I form the view that it was voluntarily made and that there are portions of it that are true. I accept the circumstances of the case as put forward by the Crown...."

Her reasoning cannot be faulted in this regard. The application for leave to appeal against the conviction must, therefore, be refused and the conviction must stand.

Sentence

[27] The sentence imposed by the learned trial judge requires separate consideration. The sentence in respect of the illegal possession of firearm cannot be said to be manifestly excessive. She imposed what could be considered the norm of seven years for that offence.

[28] The learned trial judge, however, stated that she was bound by statute to impose a statutory minimum sentence of 15 years in respect of the charge of robbery with aggravation. She said at page 158 of the transcript:

"I am going to pass the sentence that I have to pass because the lawmakers, the people who make the law say that the least amount of time that I can give you is 15 years, that is what I [sic] they say. So I have to pass that sentence on you in Count 2, which is the Robbery..."

[29] The Firearms Act does not support that statement. Whereas section 25(3) of that Act stipulates a minimum sentence of 15 years for certain offences, robbery with aggravation, for which Mr Thompson was charged, is not one of them.

[30] Section 25 of the Firearms Act states in part:

"(1) Every person who makes or attempts to make any use whatever of a firearm or imitation firearm with intent to commit or to aid the commission of a felony or to resist or prevent the lawful apprehension or detention of himself or some other person, shall be guilty of an offence against this subsection.

(2) Every person who, at the time of committing or at the time of his apprehension for, any offence specified in the First Schedule, has in his possession any firearm or imitation firearm, shall, unless he shows that he had it in his possession for a lawful object, be guilty of an offence against this subsection and, in addition to any penalty to which he may be sentenced for the first mentioned offence, shall be liable to be punished accordingly.

(3) Any person guilty of an offence against subsection (1) or (2) shall be liable on conviction on indictment—

(a)...

(b) before a Circuit Court to imprisonment for life or such other term being not less than fifteen years, as the Court considers appropriate with or without hard labour,

and where any person commits an offence against subsection (1) in respect of the commission of a felony or the lawful apprehension or detention of himself for any other offence committed by him, he

shall be liable to the penalty provided by this subsection in addition to any penalty to which he may be sentenced for that felony or other offence.”
(Emphasis supplied)

[31] The first schedule referred to in section 25(2) of the Firearms Act speaks to a number of Acts including the Larceny Act. The portion that speaks to the Larceny Act states:

“1. Offences against sections 5 to 7, 17 to 20, 38 to 41, paragraphs (2), (3) and (4) of section 42 and sections 43 and 44 of the Larceny Act.”

[32] Mr Thompson was charged with robbery with aggravation contrary to the provisions of section 37(1)(a) of the Larceny Act. It is therefore not one of the sections mentioned in the first schedule of the Firearms Act to which section 25(2) refers. The learned trial judge was, therefore, in error, in taking the position that she was bound to impose a minimum sentence on Mr Thompson.

[33] It may be that the learned trial judge thought that she was bound by the minimum sentence because of the stipulation in section 25(3), which is highlighted above. It must be noted, however, that that provision would only have been applicable, and a minimum sentence for robbery with aggravation could only have been imposed, if Mr Thompson had been charged with an offence under section 25(1) of the Firearms Act. That was not the case. The difference between charges laid pursuant to section 20(1)(b) of the Firearms Act as opposed to section 25(1) were explained in **R v Henry Clarke** (1984) 21 JLR 72, at page 75.

[34] In light of the learned trial judge's error, we revisit the sentence imposed in respect of the robbery with aggravation. The usual sentence imposed for robbery with aggravation involving a firearm is one of 12 years. This may be increased or reduced according to the circumstances of the case.

[35] There was no egregious aspect to this robbery which would warrant any increase to the sentence usually imposed for this offence. Mr Thompson had no previous conviction and he was said to have been gainfully employed at the time of the commission offence. The usual sentence should therefore be applied. The sentence imposed by the learned trial judge should therefore be set aside and a sentence of 12 years imposed in substitution therefor.

Conclusion

[36] Based on that analysis, the application for leave to appeal against the conviction must be refused. The application for leave to appeal against sentence is granted. The hearing of the application for leave against sentence is treated as the hearing of the appeal against sentence. The appeal against sentence is allowed. The sentence in respect of count one shall stand. The sentence of 15 years in respect of count two is set aside and a sentence of 12 years is substituted therefor. The sentence is to be reckoned as having commenced on 29 July 2011.